

HONORABLE ROBERT S. LASNIK

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRUCE KEITHLY, DONOVAN LEE,  
and EDITH ANNA CRAMER,  
Individually and on Behalf of all Other  
Similarly Situated,

Plaintiffs,

vs.

INTELIUS, INC., A Delaware  
Corporation; and INTELIUS SALES,  
LLC, A Nevada Limited Liability  
Company,

Defendants.

Case No. C09-1485-RSL

JOINT STATUS REPORT

1. Statement of Nature and Complexity of the Case.

(a). Plaintiffs' Statement of the Case.

This class action is brought against Intelius, Inc. and Intelius Sales, LLC for engaging in deceptive and unfair business practices – in the form of post transaction marketing, including such practices known in the industry as “enticements,” “negative option pricing” and “post-acceptance retention ploys” – in violation of the Washington Consumer Protection Act. Specifically, Plaintiffs allege that Defendants systematically employ common techniques to

JOINT STATUS REPORT - 1

1 market programs on the Intelius.com website in a manner that is likely to deceive, and indeed  
2 actually has deceived, thousands of consumers who unintentionally become enrolled in  
3 recurring monthly memberships operated by third parties. Intelius receives substantial  
4 revenue from these deceptive sales. Defendants are the subject of numerous governmental  
5 investigations including several Attorney General's offices and the Senate Committee on  
6 Commerce, Science and Transportation for these highly aggressive and deceptive sales  
7 practices.

8 Defendants' post transaction marketing of negative option programs occurs after a  
9 customer purchases an information report sold by Intelius. After the customer enters his credit  
10 card information, he clicks on a button that says "Complete the Purchase and Show My  
11 Report." Instead of getting a report, the customer is redirected to an interstitial page which  
12 presents a negative option program offer that requests the consumer to enter the email address  
13 and click on a large red button exclaiming, "YES And show me my report." When the  
14 consumer clicks on the red button, trying to obtain the electronic report that he just purchased,  
15 he unwittingly has signed up for a "7-day trial" of a negative option program; the failure to  
16 cancel membership within 7 days results in a recurring monthly charge to his credit card, even  
17 though the consumer never provided his credit card number to make this second purchase.  
18 Defendants do not mention this negative option program on their website, or provide any  
19 webpage or confirmation alerting the consumer that they have just purchased an additional  
20 program.

21 In the context of the complete transaction between Intelius and the consumer, the  
22 interstitial page includes features that minimize the likelihood of a consumer understanding  
23 and providing meaningful consent to the purchase. Indeed, this page was likely designed with  
24 the help of psychologists and behavioral specialists to hit human psychological cues and  
25 obfuscate any purported disclosure in an effort to cause people to inadvertently enroll in the

1 negative option programs. Plaintiffs Keithly, Lee and Cramer each claim that they purchased  
2 programs that they did not knowingly accept, and charges were made to their credit cards  
3 without their knowledge, authorization or consent.

4 (b). Defendants' Statement of the Case.

5 Intelius is a leading provider of information services, including online background  
6 reports and people searches. Intelius also has a substantial employment screening business.  
7 According to the allegations of the Complaint, in June 2008 and April 2009, respectively,  
8 plaintiffs contracted *via* the Intelius website to purchase certain services. Plaintiffs allege that  
9 Intelius enrolls its customers in a subscription based service with non-party Adaptive  
10 Marketing LLC ("Adaptive") without disclosing the details and/or benefits of the Adaptive  
11 services. According to plaintiffs, this arrangement permits non-party Adaptive "to foist  
12 unwanted services (and the related monthly charges) on unsuspecting consumers without full  
13 or adequate disclosure." Complaint ("Cmplt."), ¶ 2.

14 As discussed in Intelius' Motion to Dismiss (Docket No. 18), plaintiff Keithly  
15 purchased a subscription to Intelius' own Identity Protect product via an "in-cart" offer, not a  
16 post-transaction offer from Adaptive or anyone else. Plaintiff Lee/Cramer did enter into a  
17 subscription agreement with Adaptive via Intelius' website.

18 All of plaintiffs' claims will fail for a variety of reasons. First, the actual content of the  
19 website pages generally referenced in the Complaint and integral to plaintiffs' claims  
20 conclusively contradict their allegations. With respect to Lee/Cramer's accepting the Adaptive  
21 offer, Intelius provided them with clear disclosures about the subscription service in which  
22 they were enrolling, the terms and conditions of enrollment, including the billing amount and  
23 period, and how to cancel the subscription. The Adaptive offer required that plaintiffs submit  
24 electronic signatures in order to enroll. To do so, plaintiffs had to enter, and then reenter, their  
25 respective e mail addresses. The significance of these actions was clearly spelled out in plain

1 language immediately adjacent to the location on the computer screen where a) the action of  
2 enrolling occurred and b) the e mail addresses had to be twice entered. No reasonable  
3 consumer reading this language could fail to understand the offer, the transaction that would  
4 result from acceptance, or the method for indicating acceptance or for declining the offer.  
5 Plaintiffs cannot sustain a claim based on the allegation that they simply did not read the clear  
6 language. This is equally true with respect to the in-cart IDP offer, which contains clear and  
7 repeated disclosures of its terms.

8 Second, with respect to the Adaptive offer, plaintiffs' essential claim is that Lee/Cramer  
9 were duped into enrolling in the Adaptive program (i.e. that there is no valid contract between  
10 Lee/Cramer and Adaptive). To prevail against Intelius, plaintiffs must show that they did not  
11 enter into a valid contract with Adaptive for the services in question, yet plaintiffs have failed  
12 to join Adaptive, one of the parties to this contract, to this action.

13 Other (non-Intelius customer) enrollees have sued Adaptive. In the leading case  
14 regarding Adaptive offers, the Southern District of Texas recently ruled that essentially  
15 identical Adaptive advertisements to that involved here, offered through an Adaptive website  
16 partner (analogous to Intelius' position here), were not deceptive as a matter of law. *See In re*  
17 *VistaPrint Corp. Marketing & Sales Practices Litig.*, 2009 LEXIS 77509 (S.D. Tex. Aug. 31,  
18 2009).

19 The S.D. Texas case did not include allegations regarding any Intelius product and did  
20 not address the in-cart Intelius IDP product on which plaintiff Keithly bases his claim. Even a  
21 superficial comparison of the Adaptive and IDP offers shows that the Intelius IDP offer  
22 accepted by Keithly is even clearer than the Adaptive offer accepted by Lee/Cramer.

23 2. Statement of ADR Method. The parties believe that mediation pursuant to  
24 Local Civil Rule 39.1(a) may be appropriate. Plaintiffs are amenable to mediation prior to a  
25 decision on class certification.

1           3.     Proposed Deadline for Joining Additional Parties. Plaintiffs propose joining  
2 additional parties by the close of discovery. Defendants believe that non-party Adaptive  
3 Marketing LLC is a necessary party and should be added immediately.

4           4.     Dispositive Motions. Intelius' motion to dismiss is currently pending.  
5 Plaintiffs do not anticipate filing a dispositive motion in the next three months.

6           5.     Class Certification Motion Practice. The parties propose the following  
7 deadlines for class certification briefing:

8                   October 1, 2010: Plaintiffs' motion for class certification

9                   November 10, 2010: Defendants' opposition

10                  December 22, 2010: Plaintiffs' Reply

11           These deadlines deviate from the period set in LR CR 23(f)(3). However, there is good  
12 cause for enlargement of time here. First, the parties have fully briefed a motion to dismiss that  
13 is currently pending before the Court. In the interest of both judicial economy and expense to  
14 the parties, the parties propose deferring class discovery and setting the class certification  
15 schedule after the motion to dismiss is adjudicated. Second, Defendants have moved before  
16 the Judicial Panel on Multidistrict Litigation ("Judicial Panel") for an order transferring a  
17 nearly identical action pending in Central District of California (*Baxter et al. v. Intelius Inc et*  
18 *al.*, Case No. 8:09-cv-01031-AG-MLG). Intelius has requested that the Judicial Panel transfer  
19 the *Baxter* case (and any subsequently filed related cases) to this District Court for centralized  
20 pretrial proceedings. Intelius' transfer motion is set for hearing on March 25, 2010. Third,  
21 Defendants will oppose class certification and both parties agree that limited class certification  
22 discovery is necessary before briefing. However, plaintiffs do not believe class certification  
23 discovery should be bifurcated because such bifurcation inevitably leads to unnecessary,  
24 wasteful, and expensive discovery disputes over the scope of bifurcation. Finally, Defendants'  
25

1 trial counsel currently is scheduled for a multi-week trial in another complex matter starting on  
2 September 13, 2010.

3 6. Proposed Discovery Plan.

4 A. Initial Disclosures. The parties held a Fed. R. Civ. P. 26(f) conference  
5 on March 2, 2010, and initial disclosures were exchanged on March 9, 2010.

6 B. Discovery will be needed on each element to prove Plaintiffs' Consumer  
7 Protection Act Claim. Plaintiffs propose that discovery on class certification should be  
8 conducted coextensively with discovery on liability and damages. Defendants propose that  
9 discovery be bifurcated as outlined below.

10 C. The parties do not request a change in the limitations on discovery  
11 imposed under the Federal and Local Civil Rules. However, both parties reserve the right to  
12 request a change to the scheduling order with regard to the number of depositions permitted

13 D. Electronically Stored Information.

14 D-1. Plaintiffs' Position Statement.

15 Plaintiffs recommend the following in order to minimize expense: All documents or  
16 Electronically Stored Information (ESI) that can be imaged, including documents that currently  
17 exist in hard copy form, should be produced as images on optical disks (*i.e.*, CDs or DVDs)  
18 accompanied by image load files, and database load files capturing metadata. Each image will  
19 bear a unique production number and any applicable confidentiality language pursuant to the  
20 parties' protective order. The image and database load files will provide all available  
21 information regarding the following characteristics of the imaged documents and ESI:  
22 Unitization (including the production number of the first and last page of each document);  
23 Attachments (including information sufficient to identify the parent and child relationships of  
24 all documents and ESI that are or have attachments); and Searchable Text (including  
25 electronically extracted text or, if electronically extracted text is unavailable, OCR text);

1 Metadata (including custodian information, file properties, and email author, recipient, date,  
2 and subject fields). Documents may be provided in black-and-white format, but any party may  
3 later request that particular documents or ESI be produced as native files or as color images.  
4 Producing parties are generally required to use the version of any document that they produced  
5 in all subsequent proceedings (*e.g.*, a party may not produce a document only as black-and-  
6 white image and later rely on a native file or color image of that document), except that a party  
7 may use an original hard copy of a document if the image of the original document that the  
8 party produced is a fair and accurate copy of the original. The parties will meet and confer  
9 regarding any responsive documents that do not fall within any of the categories described in  
10 this paragraph, including documents maintained in a database. Plaintiffs further anticipate  
11 conducting discovery through search terms, and suggest the parties enter into a separate  
12 electronic discovery protocol, which the parties agree to file in conjunction with a protective  
13 order. The electronic discovery protocol will include de-duplication processes to run against  
14 the discovery population and detailed specifications of the above mentioned production  
15 formats to meet each party's data hosting platform requirements. These protocols do not  
16 impose obligations in excess of those under the Federal Rules.

17 D-2. Defendants' Position Statement.

18 Intelius agrees with plaintiffs' suggestion that the parties cooperate in order to conserve  
19 resources and eliminate duplicative efforts. Intelius has preserved electronic data relating to  
20 plaintiffs' claims and is in the process of determining the most effective means by which to  
21 review and produce these materials. To the extent that the data fields identified in plaintiffs'  
22 position statement are readily available, Intelius does not object to providing those, subject to  
23 any objections it may have to particular requests, including any applicable privilege. However,  
24 Intelius objects to any ESI protocol that impose upon it obligations in excess of those under the  
25

1 Federal Rules, including any that purport to place the burden and expense of populating or  
2 recreating metadata fields on Intelius.

3 Intelius intends to seek discovery of the computers that plaintiffs (and potentially  
4 putative class members) used to effect the transactions at issue in plaintiffs' complaint.

5 D-3. Joint Position Statement.

6 The parties agree to negotiate a framework for electronic and hard copy discovery in  
7 order to achieve a cost effective and expedient discovery plan.

8 E. Protective Order. The parties anticipate entering into a protective order.

9 7. Discovery Cut-Off.

10 Plaintiffs' Position.

11 Plaintiffs propose that the parties undertake liability and damages discovery  
12 concurrently with class certification discovery. Plaintiffs do not believe that showings of  
13 commonality and predominance, as required for class certification, can be separated from  
14 merits discovery. As discussed above, Plaintiffs oppose bifurcation of class and merits  
15 discovery because it causes unnecessary, wasteful, and added expense to the litigation.  
16 Plaintiffs propose that fact discovery will be completed by December 17, 2010, and expert  
17 discovery be completed by April 15, 2011. Under Defendants' Position (below), merits fact  
18 discovery could not begin until 2011, after the class certification motion is adjudicated.

19 Defendants' Position.

20 Defendants propose that discovery be bifurcated. Defendants propose that class  
21 certification discovery be completed by September 1, 2010. Defendants propose that fact  
22 discovery should commence after the Court rules on plaintiffs' motion for class certification  
23 and that the Court should set fact and expert discovery deadlines after it has determined  
24 whether the case proceeds as a class action or individual claims. Defendants disagree with  
25 plaintiffs' characterization of bifurcated discovery, particularly where the proposed



1 certification briefing schedule affords the parties and the Court sufficient time for determining  
2 the appropriate scope of discovery necessary to decide certification through additional meet  
3 and confer under Rule 26 and, if necessary, a Rule 16 hearing before the Court. Moreover, in  
4 this case, the scope of merits discovery necessarily will depend on the characteristics of the  
5 class (if any) certified by the Court. (e.g. relevant time period, offers, etc.).

6 8. Use of Magistrate. The parties do not agree to the referral of this case to a  
7 Magistrate Judge.

8 9. Suggestions for Shortening or Simplifying the Case. The parties have no other  
9 suggestions for shortening this case, but agree to not engage in unnecessary discovery.

10 10. Anticipated Trial Date. If a class is certified, plaintiffs propose a trial date in  
11 November, 2011. In the event that class certification is denied, the plaintiffs request the court  
12 set a status conference to discuss the case schedule. Defendants propose that the trial date be  
13 set for a date no later than twelve months after ruling on the plaintiffs' motion for class  
14 certification.

15 11. Plaintiffs have filed a jury demand. This will be a jury trial.

16 12. The parties presently estimate that the length of a trial will be 10 judicial days.

17 13. The names, addresses and telephone numbers of trial counsel are listed below as  
18 undersigned counsel.

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1 DATED this 16<sup>th</sup> day of March, 2010.

2  
3 By s/Tyler L. Farmer  
4 DANIELSON HARRIGAN LEYH &  
TOLLEFSON, LLP

5 Arthur W. Harrigan, Jr., WSBA #1751  
6 Tyler L. Farmer, WSBA #39912  
7 999 Third Avenue, Suite 4400  
8 Seattle, Washington 98104  
9 Telephone: (206) 623-1700  
Facsimile: (206) 623-8717  
arthurh@dhlt.com  
tylerf@dhlt.com

10 *Attorneys for Defendants Intelius, Inc and Intelius*  
11 *Sales, LLC*

12 By s/Karin B. Swope  
13 KELLER ROHRBACK L.L.P.

14 Mark A. Griffin, WSBA #16296  
15 Karin B. Swope, WSBA #24015  
16 1201 Third Avenue, Suite 3200  
17 Seattle, WA 98101  
Tel:(206) 623-1900; Fax: (206) 623-3384  
mgriffin@kellerrohrback.com  
kswope@kellerrohrback.com

18 COEHN MILSTEIN SELLERS & TOLL  
19 P.L.L.C.

20 Andrew N. Friedman  
21 Victoria S. Nugent  
22 Whitney R. Case  
23 1100 New York Avenue, N.W., Suite 500 West  
24 Washington, DC 20005-3964  
25 Tel: (202) 408-4600; Fax: (202) 408-4699  
afriedman@cohenmilstein.com  
vnugent@cohenmilstein.com  
wcase@cohenmilstein.com

*Counsel for Plaintiffs Bruce Keithly, Donovan*  
*Lee and Edith Anna Cramer*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of March, 2010, I served a true and correct copy of the foregoing JOINT STATUS REPORT on the following individuals:


**Attorney for Plaintiffs**

Mark A. Griffin, WSBA #16296  
Karin B. Swope, WSBA #24015  
Keller Rohrback L.L.P.  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101  
Telephone: (206) 623-1900  
Fax: (206) 623-3384  
Email: [mgriffin@kellerrohrback.com](mailto:mgriffin@kellerrohrback.com)  
[kswope@kellerrohrback.com](mailto:kswope@kellerrohrback.com)

\_\_\_\_ Messenger  
\_\_\_\_ Email  
XX ECF  
\_\_\_\_ Facsimile  
\_\_\_\_ US Mail

Andrew N. Friedman  
Victoria S. Nugent  
Whitney R. Case  
Coehn Milstein Sellers & Toll P.L.L.C.  
1100 New York Avenue, NW, Suite 500 West  
Washington, DC 20005-3964  
Telephone: (202) 408-4600  
Fax: (202) 408-4699  
Email: [afriedman@cohenmilstein.com](mailto:afriedman@cohenmilstein.com)  
[vnugent@cohenmilstein.com](mailto:vnugent@cohenmilstein.com)  
[wcase@cohenmilstein.com](mailto:wcase@cohenmilstein.com)

\_\_\_\_ Messenger  
\_\_\_\_ Email  
XX ECF  
\_\_\_\_ Facsimile  
\_\_\_\_ US Mail

  
\_\_\_\_\_  
Susie Clifford